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Supreme Court of the United States

October Term, 1954
No. 344

JAMES A. VAUGHAN,

Petitioner,

against

PETROLEUM CONVERSION CORPORATION, Bankrupt, and WILLIAM DUFFY, JR., Trustee in Bankruptcy,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES A. VAUGHAN, *pro se,*
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New York 6, New York.

APPELLATE PRESS CORP., 114 WORTH STREET, N. Y., COrtlandt 7-7627

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, James A. Vaughan, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the District of Connecticut dismissing your petitioner's complaint for relief, under Rule 60(b)(4)(6) F. R. C. P., 28 U. S. C. A. from enforcement of a judgment against your petitioner entered by the referee in bankruptcy of the United States District Court for the District of Delaware, and registered in the District Court for Connecticut under Section 1963, U. S. C. A.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit, filed March 24, 1954, is reported in *Vaughan* v. *Petroleum Conversion Corporation, et al.*, 211 F. (2d) 499

and the opinion of the District Court for Connecticut, filed July 24, 1953, is reported in *Vaughan* v. *Petroleum Conversion Corporation, et al.*, 120 Fed. Supp. 175.

Jurisdiction

The judgment of the Court of Appeals, affirming the judgment of the Connecticut District Court entered July 24, 1953, was dated and entered March 24, 1954.

An order of the Court of Appeals denying petition for rehearing is dated April 19, 1954.

An order of this Court granting an extension of time to and including September 16, 1954 within which to petition for certiorari is dated July 14, 1954.

The jurisdiction of this Court to issue the writ of certiorari requested is invoked under Section 1254(1), Title 28, U. S. C.

Questions Presented

1. Did the Delaware referee in bankruptcy have the power to assume and exercise summary jurisdiction over the substantial adverse claims between the trustee in bankruptcy and your petitioner and to enter a judgment against your petitioner—

(a) where your petitioner, to protect his position as a scheduled creditor, filed claims against the bankrupt on November 19, 1948 for $318, representing a loan to the bankrupt and for $2,000, representing an unpaid balance of retainer fee of $300 per month for legal services rendered to the bankrupt prior to bankruptcy,

(b) where, at the first adjourned meeting of creditors held January 19, 1949, the trustee submitted "Mr. Cooch's Memorandum" as his report of an investigation of the

New York trial record in the case of *Dickinson* v. *Rinke, et al.*, in which the trustee and his attorney approved the decision of the trial Judge holding as "baseless" a stale charge, made by one Alexander Kahan in an attempted strike suit, that your petitioner served interests adverse to the bankrupt in the *Dickinson* v. *Rinke* litigation, and also approved as "fully justified" the cooperation at the trial between the attorney for the bankrupt, an intervener, and your petitioner, attorney for the intervening class known as Rinke Subscribers,

(c) where the referee, with your petitioner's substantial claims and the trustee's report before him, thereupon determined and announced in a series of rulings that he did not have jurisdiction over the subject matter, rejected the trustee's suggestion of restitution proceedings based on the trustee's accountant's report also filed January 19, 1949, and closed the record,

(d) where, the trustee having accepted the referee's said jurisdiction determination, your petitioner, as one of the two remaining officers of the bankrupt, thereafter appeared at two succeeding meetings on written notice from the referee, and testified concerning the bankrupt's affairs and all claims filed against the bankrupt with which he was familiar,

(e) where, contrary to his report to the referee on January 19, 1949 and in an unexplained about-face, the trustee, ten (10) months thereafter and on October 3, 1949, filed a counterclaim against your petitioner for restitution of all fees authorized and paid by the bankrupt for legal services rendered during the ten (10) year period 1938-1948, plus all out-of-pocket disbursements, and of all salary as vice president of the bankrupt for the four (4) year period 1944-1948 based on the trustee's accountant's report also filed January 19, 1949, asserting the stale allegation that your petitioner "In the *Dickinson* v. *Rinke* litigation was interested adversely to Bankrupt",

(f) where the trustee did not submit proof to support the allegations of his counterclaim and the counterclaim is devoid of any jurisdictional allegation as required by Rule 8(a)(1) of the Rules of Civil Procedure,

(g) where, the trustee having accepted the referee's determination announced on January 19, 1949 that he was without jurisdiction over the substantial adverse claims, your petitioner did not introduce defenses or produce witnesses but, to avoid any claim of default and to have the record conform with the facts, did file a response stating the facts denominated "Answer",

(h) where your petitioner adopted in open court the written protest of the attorney for the bankrupt against the exercise of summary jurisdiction, entitled "In Reference to the claims of James A. Vaughan and Counterclaim of Trustee Thereto", filed during the bankruptcy proceedings, on March 15, 1950, and argued at a meeting scheduled by the referee on April 26, 1950,

(i) where, eighteen months after he made his jurisdiction pronouncements, the referee ignored the mandate of Rule 12(h)(2) of the Rules of Civil Procedure, and on July 6-7, 1950 filed his findings of fact, conclusions of law and opinion sustaining the trustee's counterclaim, but concealed by wholly omitting therefrom any reference to his own prior non-jurisdiction determination or said protests—thus misleading the Delaware District Court on review,

(j) where your petitioner, on July 13, 1950 and prior to entry of the referee's final order or judgment on September 7, 1950, filed a formal written protest against such exercise of summary jurisdiction and the entry of any judgment or order against him by the referee?

2. Did the District Court for Delaware on petition for review, and the Court of Appeals for the Third Cir-

cuit on appeal, have the power, within the accepted and usual course of judicial proceedings and the mandate of Rule 12(h) (2) of the Rules of Civil Procedure, to ignore, as they did, (a) the referee's undisputed determination of record that he was without jurisdiction over the substantial adverse claims between your petitioner and the trustee in bankruptcy and (b) your petitioner's protest in open court adopting the written challenge of the attorney for the bankrupt, all of which was brought to the attention of both courts in the certified record and in petitioner's briefs and in argument?

3. Did the District Court for Connecticut, on the trustee's motion that "for lack of jurisdiction over the subject matter * * * by reason of prior litigation in the United States District Courts for the District of Delaware and for the Southern District of New York, the subject matter of said complaint is *res judicata*", have the power to dismiss petitioner's independent action under Rule 60(b)-(4)(6) of the Rules of Civil Procedure asking for relief from the Delaware referee's judgment, entered in the District Court for Delaware and registered in the District Court for Connecticut,

(a) where the trustee's claim—that the Delaware referee's judgment was *res judicata*—is not available to the trustee in a proceeding under Rule 60(b), the sole purpose of the proceeding being to obtain equitable relief from the effect of that judgment,

(b) where the trustee's claim—that the subject matter of the complaint was *res judicata* "by reason of prior litigation * * * in the Southern District of New York" (in the case of *Dickinson* v. *Rinke et al.*)—conforms with the record and is wholly in accord with your petitioner's contention throughout this litigation?

4. Did the District Court for Connecticut have the power, within the accepted and usual course of judicial proceedings, to dismiss your petitioner's action,

(a) where your petitioner's complaint specifically asks relief under subsections (4) and (6) of Rule 60(b), whereas the Court, with obvious prejudice, wholly ignored the Delaware referee's undisputed non-jurisdiction determination of record, as set forth in petitioner's verified complaint, and gratuitously set up and knocked over irrelevant "straw men", *e.g.*: "surprise", whereas petitioner did not claim "surprise"; what your petitioner should have known about the "state of development" of "the law on summary jurisdiction" to determine the question of the referee's power, whereas what the referee said, pronounced or ruled with respect to his jurisdiction in this case is of the essence; the Court's "substantial doubt" whether it could grant relief "on a motion" under Rule 60(b), whereas petitioner proceeded not by motion but by independent action; "negligence", allegedly on the part of your petitioner for not having pressed defenses, whereas, your petitioner was ready and willing to defend his claims but after the referee determined at the beginning of the bankruptcy proceedings that he was without jurisdiction over the subject matter, your petitioner was powerless to confer such jurisdiction by waiver, consent or otherwise; whether "at best" the allegations made out a case "under Rule 60(b)(1)", whereas petitioner's complaint expressly asks relief under subsections (4) and (6),

(b) where, although Rule 60(b) expressly "abolished" the old common law remedial writs and this Court has held that Rule 60(b) "strongly indicates on its face that courts no longer are to be hemmed in by the uncertain boundaries of these and other common law remedial tools", the Connecticut District Court nevertheless adverts to such remedies to support his postulate that the foundation for relief from a judgment must be fraud, whereas relief from

a "void" judgment or relief from a judgment for "any other reason" not involving fraud, may be granted,

(c) where the judgment was "on the ground that there is no basis in the complaint upon which this court should *upset*" the Delaware referee's judgment (emphasis supplied), whereas the equitable relief asked for is an injunction against enforcement of the Delaware judgment, the most common form of equitable relief from a judgment, or the prosecution of an action thereon, which does not assail the court in which the judgment was rendered, and the mandate is not addressed to the court of rendition of the judgment and does not operate upon the judgment but adjudges the rights of the parties *inter sese* in relation to the judgment and is directed to the parties only?

5. Did the District Court for Connecticut have the power to dismiss your petitioner's action for relief under Rule 60(b)(4)(6) by wholly ignoring, as it did, the allegations of petitioner's verified complaint setting forth facts of record negating the stale issue, pleaded and litigated in the case of *Dickinson* v. *Rinke* and unsuccessfully raised by one Alexander Kahan but projected in the trustee's counterclaim without proof, that your petitioner served interests adverse to the bankrupt in the *Dickinson* v. *Rinke* New York trial?

6. Did the Court of Appeals for the Second Circuit on appeal, have the power, notwithstanding Rule 12(h)(2) of the Rules of Civil Procedure and the accepted and usual course of judicial proceedings, to ignore, as it did, the referee's said undisputed non-jurisdiction determination and your petitioner's protests where such determination and protests were set forth in your petitioner's verified complaint, in brief and in argument?

7. Where the trustee in bankruptcy *at the close of proceedings before the referee* filed a counterclaim based on

the stale allegation that "in the *Dickinson* v. *Rinke* litigation (your petitioner) was interested adversely to bankrupt"; where Plaintiff Dickinson had previously pleaded in his New York action, between the same parties, that petitioner's interest was "antagonistic" to the bankrupt and in that action was litigated and decided; where on appeal by Plaintiff Dickinson Judge Maris, a member of the Court of Appeals for the Third Circuit, sat with members of the Second Circuit and joined in the unanimous opinion of the Second Circuit affirming the New York District Court decisions below (197 F. (2d) 973), and he knew, or should have known, that the said alleged adverse or antagonistic interest issue had been pleaded, litigated and decided in the New York action—Did the Court of Appeals for the Third Circuit, by the general statement (196 F. (2d) 728, 729) that "Since the issues * * * were not actually litigated in the prior New York suit the referee and the District Court did not err in declining to hold them to be *res judicata*", have the power to dismiss your petitioner's contention that the adverse interest issue alleged in the trustee's counterclaim was *res judicata*—which in turn is the identical contention made by the trustee in his motion in the Connecticut District Court to dismiss petitioner's complaint?

8. Where the trustee in bankruptcy at the close of proceedings before the referee filed a counterclaim based on the stale allegation that "in the *Dickinson* v. *Rinke* litigation (your petitioner) was interested adversely to bankrupt"; where Plaintiff Dickinson pleaded in his New York action, between the same parties, that petitioner's interest was "antagonistic" to the bankrupt, and in that action was litigated and decided, and where on appeal by Plaintiff Dickinson Judge Clark wrote the unanimous opinion of that court affirming the New York District Court decisions below (197 F. (2d) 973), and he knew, or should have known, that the said alleged adverse interest issue had been pleaded, litigated and decided in the New York action—Did

the Court of Appeals for the Second Circuit (211 F. (2d) 499), have the power to ignore your petitioner's contention that the adverse interest issue alleged in the trustee's counterclaim was *res judicata*—which in turn is the identical contention made by the trustee in his motion in the Connecticut District Court to dismiss petitioner's complaint?

9. Did the Court of Appeals for the Second Circuit have the power, based on *Cline* v. *Kaplan,* 323 U. S. 97, 89 L. Ed. 97 and the *1952 Amendment* to Section 2(a)(7) of the Bankruptcy Act, to affirm the judgment of the Connecticut District Court,

(a) where the accepted rule in *Cline* v. *Kaplan, supra,* "that consent is not given even though claimant 'participated in the proceedings' provided formal objection to summary jurisdiction is made before entry of the final order" obtained throughout this litigation,

(b) where said *1952 Amendment* to the Bankruptcy Act, now keyed to Rule 12(h) of the Rules of Civil Procedure requiring timely interposition of an objection to summary jurisdiction by motion, became effective July 7, 1952, twenty-two months after entry of the Delaware referee's order on September 7, 1950?

Statement of the Case

Prior to its adjudication as a bankrupt on August 8, 1948 by the District Court for Delaware, Petroleum Conversion Corporation was involved in protracted litigation in the District Court for the Southern District of New York (hereafter "the New York action") in the case entitled *Dickinson* v. *Rinke et al.,* commenced March 25, 1938, and in the District Court for the District of New Jersey (hereafter "the New Jersey action") in the case of *Dickinson* v. *Petroleum Conversion Corporation,* commenced March 20, 1939 (R. 11, 16, 17). The issues herein stem

from that litigation. The facts in those actions here relevant, as set forth in your petitioner's verified complaint herein, are:

The bankrupt was organized in March 1926 as successor in reorganization to Knox Process Corporation (hereafter "Knox"). In 1924 Knox was without adequate capital to carry on its patent development work. During 1925-1926 upwards of one hundred Knox bondholders and others, including your petitioner (hereafter "Subscribers"), subscribed and paid to one Arthur W. Rinke (hereafter "Rinke"), their agent, $600,000 for the current use of Knox and the ultimate use of the bankrupt. For the amounts so paid the subscribers received common stock of the bankrupt (R. 12, 13).

***Dickinson* v. *Rinke* litigation.**

An investigation in 1938 of the demands made by Dickinson in his New York action, conducted by your petitioner as a member of a committee of bankrupt's board of directors, disclosed that Dickinson and one Fred B. Lloyd (hereafter "Lloyd"), president and director of both Knox and the bankrupt, had, in connivance with Rinke, appropriated in 1926 $176,000 of the funds so paid to Rinke. Upon reporting such frauds to the bankrupt its board of directors directed counter defensive action against Plaintiff Dickinson and Defendant Lloyd and authorized employment of counsel to prosecute (R. 12-15).

Since Plaintiff Dickinson was moving affirmatively against the bankrupt it was required to prosecute. On March 15, 1939 the bankrupt commenced an action in the Court of Chancery for New Castle County, Delaware, for cancellation of certain of its stock sought by Dickinson and for recovery of said funds from Dickinson and Lloyd. On April 3, 1939 the bankrupt filed an answer to Dickinson's complaint in the New Jersey action, a counterclaim against Dickinson and Lloyd and a cross-claim against the Sub-

scribers, for recovery of the said funds so appropriated (R. 15-17).

All Subscribers became stockholders, and some were noteholders, of the bankrupt, but none of the Subscribers was joined as defendant by plaintiff Dickinson in his New York or New Jersey action. However, the attorneys for the bankrupt in the New Jersey action, first Hon. Arthur T. Vanderbilt and Shelton Pitney, Esq., of the New Jersey Bar, and subsequently the attorney for the bankrupt in the New York action, J. Harlin O'Connell, of the New York Bar, advised the bankrupt and your petitioner, as its counsel, that in view of the overlapping interests of the Subscribers and since the facts and the law in respect to the right of either the bankrupt or the Subscribers to recover the appropriated funds were common to both, the Subscribers should intervene as a class in both actions and claim said funds, not only to foreclose any possible escape by Dickinson and Lloyd in event the bankrupt should not succeed but also to have all recovery rights with respect to such appropriated funds, including the rights as between the bankrupt and the Subscribers, determined in one and the same suit—thus avoiding possible multiplicity of suits (R. 19-22). The trial procedure so recommended by the bankrupt's attorneys was thereafter followed.

Efforts among those Subscribers who were jurisdictionally qualified to serve as representatives of the class failed to secure a consent until the New Jersey action was about to be reached on the trial calendar when E. Lewis Burnham (hereafter "Burnham") consented to serve but on condition that your petitioner would also jointly represent the class with him. Accordingly, your petitioner resigned all official connections with the bankrupt on April 2, 1942 and, with full knowledge and approval of its board and numerous of its stockholders with whom your petitioner had been associated for upwards of fifteen (15) years, made application conjointly with Burnham, to intervene

in the New Jersey action as representative of the Subscribers as a class. The order of the court granting the application, over the opposition of Dickinson, was entered April 14, 1942 (R. 24-26). It was from this date that the referee found that petitioner represented interests adverse to the bankrupt.

Following adverse decisions on preliminary motions in the New Jersey action Dickinson consented to trial in the District Court for the Southern District of New York of all issues then pending between the parties. The bankrupt in its own behalf, and Burnham and your petitioner in behalf of the Subscribers, were permitted to intervene in the New York action by order of the court entered December 3, 1943 and the New Jersey and Delaware actions were dismissed (R. 30, 31).

Motions for intervention of Burnham and your petitioner, individually and for the Subscribers, were made in both the New Jersey and New York District courts by the attorneys for the bankrupt, respectively. The bankrupt, and Burnham and your petitioner on behalf of the Subscribers, filed answers to Dickinson's complaint in the New York action, counterclaims against Plaintiff Dickinson and Defendant Lloyd and also cross-claims each against the other (R. 32, 33).

Having raised the issue in his New Jersey action that your petitioner was serving conflicting interests Dickinson again, in his reply to Burnham and your petitioner's counterclaim in the New York action, raised the same issue and objected to representation of the class by Burnham and your petitioner under Rule 23 of the Rules of Civil Proceduce on the ground that they represented conflicting or "antagonistic" interests (R. 33-36).

Pursuing the trial procedure recommended by the several attorneys for the bankrupt the second trial of the New York action was conducted by J. Harlin O'Connell,

of the New York Bar, attorney for the bankrupt, with the active participation of your petitioner as attorney for the Subscribers as a class (R. 37). Officers and members of the bankrupt's board participated in the preparation for trial and as witnesses at the trial, including your petitioner. Discussions of the *Dickinson* v. *Rinke* suit occurred at meetings of bankrupt's board of directors from the time the suit was commenced without opposition to Burnham and your petitioner representing the Subscribers (R. 24, 34, 35, 39).

Further pursuing said trial procedure so recommended there were filed in behalf of the bankrupt and the Subscribers, (1) a joint brief, stating on page 1 thereof the conflict of claims between the bankrupt and the Subscribers and requesting the court, as between them, to determine the right of recovery, and (2) joint proposed Findings of Fact and Conclusions of Law (R. 38, 39).

The opinion of the New York District Court dated October 11, 1946 sustained the claim of the Subscribers. On the joint motion of the attorney for the bankrupt and your petitioner as attorney for the Subscribers an interlocutory decree thereon, dated April 10, 1947, was entered (R. 39, 40).

By direction of the New York District Court your petitioner gave notice to the Subscribers of their rights under said decree to intervene and claim their respective shares of the award (R. 41). Upon completion of proceedings on proof of claims the judgment was entered on August 3, 1948. On appeal the judgments of the New York District Court were affirmed by the opinion of Judge Clark in which Judge Chase and Judge Maris, of the Third Circuit, concurred (*Dickinson* v. *Burnham*, 197 F. (2d) 973). Application for writ of certiorari was denied (344 U. S. 875, 97 L. Ed. 678) (R. 42).

Petroleum Conversion Corporation bankruptcy proceedings in the District Court for Delaware.

The attack by the trustee and his attorney in the bankruptcy proceedings, and the alleged grounds of their counterclaim against your petitioner, stem directly from and project the unsuccessful effort of one Alexander Kahan, Esq. (hereafter "Kahan"), a New York attorney, to enter the *Dickinson* v. *Rinke* protracted litigation at its close and his further unsuccessful effort to enter the bankruptcy proceedings at their beginning (R. 42-45). Immediately preceding the close of proceedings directed by the decree of April 10, 1947 in the New York action and on March 1, 1948, Kahan, purportedly representing two individuals who immediately prior thereto acquired certain of bankrupt's preferred stock, unsuccessfully attempted to enter the *Dickinson* v. *Rinke* litigation alleging, *inter alia,* that at the trial on the merits there was a conflict of interests between the bankrupt's attorney and your petitioner representing the Subscribers as a class (R. 42, 43). Denying Kahan's petition the New York District Court, in its opinion dated March 16, 1948, held Kahan's charges to be "baseless" (R. 46-48).

Again, upon the adjudication of bankruptcy in August 1948, Kahan unsuccessfully sought, allegedly in behalf of four creditors, to appeal the judgment of the New York District Court entered April 10, 1947, which was denied by this court in *Dickinson* v. *Petroleum Conversion Corporation,* 338 U. S. 507, 94 L. Ed. 299. See Note 5.

At the first adjourned meeting of creditors held January 19, 1949), (1) the trustee submitted his report ("Mr. Cooch's Memorandum") on an investigation in New York, by himself and his attorney, of the *Dickinson* v. *Rinke* trial record. In this report the trustee and his attorney took issue with Kahan's "great stress on a claimed conflict of interest between (your petitioner) and Petroleum Conversion Corporation"; approved as "fully justified" the coopera-

tive efforts of trial attorneys O'Connell, for the bankrupt, and your petitioner, for the Subscribers; reported the disclosure, on page 1 of the joint trial brief, of the conflict of claims between the bankrupt and the Subscribers and the court's decision that Kahan's charges were "baseless" (R. 46-48); (2) the referee refused to authorize any restitution action and not only announced his lack of jurisdiction "to decide" the substantial adverse claims between your petitioner and the trustee but also suggested to the trustee that any such action would have to be by "independent suit", and closed the record, stating—

> (a) With reference to the trustee's contention for restitution of funds authorized and expended by the bankrupt in its defense—
>
> The Referee: "*That is not for decision here*" (R. 53);
>
> (b) With reference to the trustee's contention for restitution from your petitioner—
>
> The Referee: "*It is not before me to decide about this thirty-three thousand*[1]*—that will have to be on an independent suit* * * *" (R. 54);
>
> (c) With reference to the trustee's contention for "recovery in the interests of creditors"—
>
> The Referee: "*I am not sitting nor can I make any decision whether there is any legal sufficiency to what could be contended, nor could I agree that you have proven it* * * *I think that would come if you bring a suit against these directors for unauthorized expenditures of money*" (R. 54, 55);

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[1] Referring to the retainer fee of $300.00 per month paid your petitioner during the ten-year period 1938-1948 but erroneously reported in the trustee's accountant's Report.

(d) With reference to the urge of one Stiftel, Kahan's Delaware attorney, for restitution against your petitioner—

The Referee: "*We are not trying this conflict, Mr. Stiftel.* We are here on a creditors' meeting, and *if there has been some technical wrong done to the corporation* (the bankrupt), *that can't be straightened out here. That has got to be done in a suit which the Trustee or creditors would bring against those they would contend are responsible*" (R. 57). (Emphasis in (a)-(d) inclusive supplied.)

The trustee and your petitioner accepted the referee's non-jurisdiction determination and rulings. Your petitioner thereafter appeared at two of the meetings on notice from the referee and, as one of the two remaining officers of the bankrupt sought, by testimony and by affidavits in extension of testimony, to have the records of the proceedings reflect the facts, including those in connection with his participation in the *Dickinson* v. *Rinke* litigation and the claims of creditors about which he had any knowledge (R. 57, 58).

At the close of the bankruptcy proceedings the trustee, contrary to his prior report ("Mr. Cooch's Memorandum") and disregarding the referee's prior non-jurisdiction determination, in an unexplained about-face filed a counterclaim against your petitioner on October 3, 1949 alleging the stale claim *inter alia* that your petitioner "was interested adversely to bankrupt" in the *Dickinson* v. *Rinke* trial—the same claim having been made and rejected on three prior occasions by the District Courts for New Jersey and for the Southern District of New York respectively (R. 67-69).

Responding to the trustee's counterclaim petitioner conferred with the trustee and his attorney on November 1, 1949 and, in confirmation of the facts discussed in con-

ference, petitioner presented to and left with the trustee a response to the counterclaim, denying its false and unsupported statements, denominated "Answer" (R. 62). And at a meeting scheduled April 26, 1950 by the referee to discuss the matter of his jurisdiction your petitioner adopted in open court the written protest of the attorney for the bankrupt "In Reference to Claims of James A. Vaughan and Counterclaims of Trustee Thereto", filed March 15, 1950 (R. 64, 65).

The referee having determined at the beginning of the bankruptcy proceedings that he did not have jurisdiction and the trustee not having offered proof to support the allegations of his counterclaim, your petitioner did not call witnesses or introduce defenses (R. 62, 63).

The referee filed and refiled his findings, conclusions and opinion on July 6-7, 1950 respectively, sustaining the trustee's counterclaim (R. 71, 72) but the referee did not make any reference therein to his prior non-jurisdiction determination of record on January 19, 1949; or to the trustee's report ("Mr. Cooch's Memorandum") adopted by the creditors January 19, 1949, taking issue with Kahan's claim that your petitioner served interests adverse to the bankrupt in the New York trial of *Dickinson* v. *Rinke*; or to the court's holding that such claim by Kahan was "baseless" (R. 46-48).

On July 13, 1950 your petitioner filed formal written protest to the assumption and exercise of summary jurisdiction by the referee under the ruling in *Cline* v. *Kaplan, supra,* "that consent is not given even through claimant 'participated in the proceedings', provided formal objection to summary jurisdiction is made before entry of the final order". The referee entered his final order on September 7, 1950 and peremptorily denied your petitioner's petition for a rehearing (R. 70, 71).

The Delaware District Court denied petition for review on August 24, 1951 (99 Fed. Supp. 899), the Third Circuit affirmed (196 F. (2d) 728) and this court denied petition for writ of certiorari (344 U. S. 917, 97 L. Ed. 707) (R. 75, 76).

In the District Court for Connecticut.

On or about April 8, 1953 the trustee registered the Delaware referee's judgment in the District Court for the District of Connecticut under the provisions of Sec. 1963, U. S. C. A. (R. 76).

On April 17, 1953 your petitioner commenced an independent action in the District Court for Connecticut by filing and duly serving his complaint on the jurisdictional ground of diversity of citizenship, asking for relief under Rule 60(b)(4)(6) of the Rules of Civil Procedure by injunction against enforcement of the said Delaware judgment (R. 2, 3, 8).

On June 8, 1953, the trustee moved to dismiss the complaint "for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted" on the grounds "that by reason of prior litigation in the United States District Courts for the District of Delaware and for the Southern District of New York, the subject matter of said complaint is *res judicata*", and that the relief sought is not authorized by the Federal Rules of Civil Procedure (R. 80-82).

On July 23, 1953 the Connecticut District Court filed his opinion granting the trustee's motion (R. 88-114) and on July 28, 1953 entered his judgment dismissing petitioner's action "on the ground that there is no basis in the complaint upon which this court should *upset* the judgment of the United States District Court for the District of Delaware" (emphasis supplied) (R. 116-117).

On August 25, 1953 petitioner served notice of appeal from the judgment of the Connecticut District Court to the Court of Appeals for the Second Circuit (R. 119).

On March 24, 1954 the Court of Appeals for the Second Circuit affirmed the judgment of the Connecticut District Court (R. 45, 46) and on April 19, 1954 denied your petitioner's petition for a rehearing (R. 56.)

ARGUMENT

I

Unless this Court intervenes herein the fundamental principle of jurisdiction, intended by the Mandate of Rule 12(h)(2) F. R. C. P. to be safeguarded, will have been violated.

By Order XXXVII of the General Orders in Bankruptcy, 28 U. S. C. A., the Federal Rules of Civil Procedure, if "not inconsistent" with the Bankruptcy Act, are applicable to proceedings in bankruptcy.

Rule 12(h)(2) of the Federal Rules of Civil Procedure provides an exception to waiver of defenses, in these words:

> "(2) * * * whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

The Advisory Committee on Rules states that Rule 12(h)(2) continues Section 80, 28 U. S. C., which "made it the duty of the court at any time, even without answer or motion, to stop the suit and dismiss or remand it, if want of jurisdiction appeared," 5 Cyc. Fed. Pro., Third Ed. 424, Section 15.429, N. 1; 2 Moore's Fed. Prac., Second Ed., 2331, N. 15. And this Court said of former Section

80 that it "did little more than to make mandatory a practice heretofore largely followed, but sometimes neglected, in the Circuit Courts", *Employers Reinsurance Corp.* v. *Bryant,* 299 U. S. 374, 378, 81 L. Ed. 289, 292.

Either the series of pronouncements by the Delaware referee at the beginning of the bankruptcy proceedings on January 19, 1949, at the suggestion of the trustee (R. 52-57), constituted the referee's jurisdiction rulings—in which event the referee determined that he was without jurisdiction over the concededly substantial claims; or, such pronouncements were mere musings and did not constitute the referee's jurisdiction rulings—in which event the referee not only failed to perform his affirmative duty to determine his jurisdiction but also by his pronouncements misled and deceived your petitioner to his injury.

One could not successfully claim that the referee's said pronouncements are not exclusively addressed to the subject matter, or that they are not exclusively addressed to the matter of the referee's jurisdiction, or that they are ambiguous, or that in the very nature of the surrounding circumstances the referee did not intend that his pronouncements should constitute his jurisdiction determination and rulings. The trustee did not claim otherwise. On the contrary the trustee thereupon accepted the referee's declination to authorize restitution proceedings—the referee stating as his ground therefor that any such proceeding " * * * will have to be on an independent suit"; * * * "It is not before me to decide"; "This is not the tribunal"; * * * "I am not now sitting nor can I make any decision * * * I think that would come if you (the trustee) were to bring a suit* * * "; * * * "We are not trying this conflict (between the trustee and petitioner) * * * if there has been some technical wrong done to the corporation (bankrupt), that can't be straightened out here. That has got to be done in a suit which the Trustee or creditors would bring

against those they would contend are responsible'' (R. 52-57).

Confronted with such rulings your petitioner, like the trustee, accepted them in the ordinary course of the proceedings. Although ready and willing your petitioner did not proceed with proof or defenses in connection with his personal claims. Instead, as one of the two remaining officers of the bankrupt, your petitioner sought, by testimony and affidavits in extension of his testimony in the usual course, to have the record reflect the facts pertaining to the bankrupt's affairs, including the facts with respect to claims of all creditors with which he was familiar (R. 57, 58).

No forthright consideration has been given in this case to the referee's own pronouncements, rulings, or determination, at the beginning of the bankruptcy proceedings on January 19, 1949, with respect to his jurisdiction over the subject matter—the source of this litigation.

The referee here, like any judicial officer, is the one in whom is vested the authority and power, and upon whom is imposed the responsibility, to determine his jurisdiction. He is ''the Court''—a federal court. What *he* has said, ruled, mused or determined with respect to his jurisdiction is of the essence, but this has been ignored. Moreover, what the referee has said with respect to his jurisdiction is always subject to litigation, but in this case the referee significantly buried his said jurisdiction rulings. And although they were brought to the attention of the District and Appellate Courts, by the certified record, by briefs and by argument, they were strangely avoided.

The fact that the trustee, at the close of the bankruptcy proceedings, filed a counterclaim did not cure the referee's jurisdiction defection because ''plainly, when jurisdiction is lacking over the primary suit, the defect cannot be cured

by a counterclaim of which the court also lacks jurisdiction", *Goldstone* v. *Payne* (C. C. A. 2nd), 94 F. (2d) 855, 857.

Thus, the duplicity jurisdiction assumed and exercised by the referee sixteen months after he made his non-jurisdiction pronouncements has been sanctioned by the District and Appellate Courts, the mandate of Rule 12(h)(2) disregarded, and your petitioner deprived of his day in court, *on the merits.*

II

Since "the matter of fact or law on which jurisdiction (herein) depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment," *Adam* v. *Saenger*, 303 U. S. 59, 62, 82 L. Ed. 649, 652, reh. den. 303 U. S. 666, 82 L. Ed. 1123.

The Court of Appeals for the Second Circuit, like the Delaware referee and the Connecticut and Delaware District Courts, ignores what the Delaware referee himself said, ruled, mused or determined of record with respect to his power to determine the substantial adverse claims (Appendix p. 32; R. 88-114).

Admitting in his opinion, dated July 6, 1950 (not printed) that:

> "This question of jurisdiction has caused me much difficulty",

—a fact first disclosed eighteen months after his non-jurisdiction pronouncements on January 19, 1949—the referee nevertheless did not pursue the accepted and usual course of judicial proceedings and certify this important question to the District Court. In lieu thereof the referee assumed and exercised duplicity jurisdiction, and the Dela-

ware Court on review, the Connecticut District Court in petitioner's independent action for relief under Rule 60(b), and the Second Circuit on appeal have sanctioned this procedure by the referee.

The referee in bankruptcy in *In re G. L. Odell Const. Co.*, 119 Fed. Supp. 578, 580, 581, followed the accepted and usual course of judicial proceedings by certifying the question of his jurisdiction to the District Court and a hearing was had on the merits. The trustee took the position that the matter was properly a subject for summary disposition in the bankruptcy proceeding because the corporation claimant submitted itself to the jurisdiction of the bankruptcy proceeding by filing a claim therein. But the Court held:

> "That a claimant should be bound by such an election at the time of filing a claim is a burden not imposed by law."

The Delaware District Court by-passed as non-existent the referee's own jurisdiction pronouncements. Having done so, he also took the liberty to by-pass the mandate of Rule 12(h)(2) as "not important here", *In re Petroleum Conversion Corporation*, 99 Fed. Supp. 899, 905, N. 28, whereas the referee's own jurisdiction pronouncements and the application of Rule 12(h)(2) thereto was of the essence.

And in harmony with the referee the Delaware District Court followed the rule of the Third Circuit in *Moonblatt* v. *Kosmin*, 139 F. (2d) 412 (C. C. A. 3d, 1943), that the respondent consented when he did not object to summary jurisdiction, either by preliminary motion or in his answer, and proceeded on the merits. But both the referee and the Delaware District Court failed to recognize, as pointed out in the reports of the Committees on the Judiciary of the Senate and House of Representatives recommending the *1952 amendment* to Section 2a(7) of the Bankruptcy

Act, that "in *Cline* v. *Kaplan, supra,* the Supreme Court, in 1944, overruled this (the Kosmin) line of cases and held, in effect, that a respondent has not consented to the summary jurisdiction of the bankruptcy court if he made formal objection at any time before the entry of the final order in the proceeding, even though the controversy had gone forward on its merits without his preliminary objection to jurisdiction" (Appendix, p. 33).

Although *Cline* v. *Kaplan* has been criticized as procedurally impracticable, and the procedural confusion has been eliminated by the 1952 amendment to Section 2a(7) of the Bankruptcy Act, nevertheless, the *Cline* v. *Kaplan* rule obtained throughout the bankruptcy proceedings herein, and at the time of entry of the referee's judgment was the law of the land and generally followed, *Ford* v. *Magee* (C. C. A. 2d), 160 F. 2(d) 457, cert. den. 332 U. S. 759, 92 L. Ed. 345, except in the Third Circuit.

In this case "the matter of fact or law on which jurisdiction depends was not litigated in the original suit". On the contrary it was buried by the referee. And what the Delaware referee himself said, ruled, or determined of record at the beginning of the bankruptcy proceedings before him, with respect to his own jurisdiction, has not only been ignored by the District and Appellate Courts but they have also sanctioned the duplicity jurisdiction which the referee subsequently assumed and exercised at the close of the proceedings, without a hearing or an opportunity then or thereafter to litigate the matter.

Accordingly, based on the jurisdiction record in this case, what the referee in bankruptcy says, rules or determines in open court with respect to his jurisdiction becomes immaterial, when the referee omits same from his Findings, Conclusions and Opinion subsequently rendered and when the District and Appellate Courts ignore same. Rule 12(h)(2) thus becomes impotent.

III

The stale issue of alleged conflict of interest raised by trustee in his counterclaim was *res judicata* by virtue of the prior decision of the District Court for the Southern District of New York as ground for his motion to dismiss—but in any event the doctrine of *res judicata* is not available to trustee in a proceeding under Rule 60(b) F. R. C. P.

As defined by the trustee and by the referee the sole issue in this litigation is a claim that petitioner served conflicting interests, or interests adverse to the bankrupt (prior to adjudication), in the trial of the case of *Dickinson* v. *Rinke et al.* (R. 42-48, 60, 61, 66).

In his report filed January 19, 1949 (Mr. Cooch's Memorandum) the trustee and his attorney initially took issue with Kahan's great stress on a claim of "conflict of interests", approved as "fully justified" the cooperation of counsel for the bankrupt and your petitioner as counsel for members of the class, noted the disclosure of their cooperation to the Court on page 1 of the joint trial brief, and cited the decision of the trial Judge in the case of *Dickinson* v. *Rinke,* dated March 16, 1948, holding the charge by Kahan as "baseless" (R. 46-48).

Further, the trustee accepted the referee's declination to authorize restitution proceedings based on the non-jurisdiction pronouncements, rulings or determination made by the referee in the same meeting on January 19, 1949 with the trustee's said report and your petitioner's claims before him under consideration (R. 52-57).

Nevertheless, at the close of the bankruptcy proceedings nine months later, the trustee filed his untimely counterclaim based on the same stale conflict of interest claims previously made in the case of *Dickinson* v. *Rinke* by Plaintiff Dickinson (R. 34, 35, 67, 68), and by Kahan in his

attempted strike suit (R. 42-45). This very issue which the trustee raised in his counterclaim is *res judicata* by virtue of the March 16, 1948 decision of the New York District Court, which as Judge Leibell said was based on "the history of this litigation, as set forth in the court's opinion of October 11, 1946, and the trial record" (R. 48).

And this Court has held that "*a fact, question or right* distinctly adjudicated in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law", *U. S.* v. *Moser*, 266 U. S. 236, 242, 69 L. Ed. 262, 264; *Partmar Corp.* v. *Paramount Theaters Corp.*, —— U. S. ——, 98 L. Ed. (Advance pp. 301, 310).

In fact, the trustee made identically the same claim in his Connecticut District Court motion to dismiss the complaint. As ground for that motion he claimed lack of jurisdiction "by reason of prior litigation in the United States District Court * * * for the Southern District of New York, the subject matter of said complaint is res judicata" (R. 80, 81). This claim is wholly in accord with petitioner's claim throughout this litigation.

Although the trustee claimed in his Connecticut District Court motion that the subject matter of the complaint was *res judicata* by reason of prior litigation in the District Court for the Southern District of New York and in the District Court for the District of Delaware (R. 81) the claim of *res judicata* was not available to him in petitioner's action asking for relief under the provisions of Rule 60(b)(4)(6).

Rule 60(b) is stated by the Advisory Committee on Rules to be derived from the California Code of Civil Procedure, Section 473. In *Caldwell* v. *Taylor*, 281 Cal. 471, 88 A. L. R. 1194, 1197 the California Court laid down the principle, which it applied in that fraud case, that:

> "The judgment, order or decree from the effect of which relief is sought cannot constitute a bar to equitable relief. A proceeding for equitable relief is not a collateral attack, and since its sole aim and purpose is to avoid the effect of said judgment, the doctrine of res judicata can have no application to such judgment."

Since the express purpose of Rule 60 is stated to be to provide the procedure to obtain "Relief from Judgment or Order" the doctrine of *res judicata,* if extended to the judgment of the Delaware referee from the effect of which relief is sought, would destroy the Rule and its purpose. Careful research has failed to produce any ruling by this Court on this point. In the interest of clarifying procedure under Rule 60 and to reduce litigation it is important that this point should be settled by this Court.

IV

Although the principle is well established that the facts alleged in the complaint must be accepted as true for purposes of a motion to dismiss, nevertheless, both the Connecticut District Court and the Court of Appeals for the Second Circuit omitted to consider the material facts as alleged in connection with the fundamental matter of jurisdiction of the Delaware referee.

In affirming the opinion of the Connecticut District Court the Second Circuit rests its decision on the "findings of waiver and consent to the summary jurisdiction of the bankruptcy court made by the United States District Court for the District of Delaware". But strangely the Second Circuit, like the Delaware and Connecticut District Court, also ignored: (1) the fact of record that the referee made pronouncements, rulings or determination with respect to

his own jurisdiction over the subject matter at the beginning of the bankruptcy proceedings as alleged in the complaint, (2) the fact as disclosed by the record that this "matter of fact or law on which jurisdiction depends was not litigated in the original suit" in the Delaware District Court and it was not adjudicated in the suit in the Connecticut District Court, (3) the accepted and usual course of judicial proceedings requiring a referee to certify to the District Court any question of jurisdictional doubt, (4) the mandate of Rule 12(h)(2) of the Federal Rules of Civil Procedure, and (5) the rule of this Court in *Cline* v. *Kaplan, supra,* and the rule of the Second Circuit in *Ford* v. *Magee, supra,* vigorously applying the rule in *Cline* v. *Kaplan, supra.*

Strangely also the Second Circuit rested its decision, not on the extraordinary opinion of the Connecticut District Court dismissing petitioner's complaint in an independent action asking relief under Rule 60(b)(4)(6) from the judgment on which petitioner's appeal was taken, but on the opinion of the Delaware District Court on petitioner's petition for review of the referee's judgment. The two procedures and the law applicable thereto respectively are different.

Moreover, the opinion of the Delaware District Court is not on the merits by virtue of the duplicity jurisdiction exercised by the referee, whereas petitioner's verified complaint in the Connecticut District Court alleges the facts as ground for the injunction relief requested and in fairness and justice petitioner is entitled to an opportunity to prove those facts in a proceeding under Rule 60(b). The statements on the basis of which the Delaware District Court rests his findings of "waiver and consent to summary jurisdiction" are false. Even after the referee made his non-jurisdiction pronouncements, rulings or determination, petitioner adopted in open court the written protest of the attorney for the bankrupt against the assumption of sum-

mary jurisdiction by the referee, and filed a formal written protest prior to entry of the referee's final order (R. 64, 65).

In *MacDonald* v. *Plymouth County Tr. Co.*, 286 U. S. 263, 76 L. Ed. 1093, "consent" to summary jurisdiction was given orally in open court and this Court sustained the exercise of summary jurisdiction on that ground. The *MacDonald* case was cited in *Cline* v. *Kaplan, supra,* to illustrate the type of "consent" to summary jurisdiction required by Sec. 23a of the Bankruptcy Act in contrast to the trick and trap consent procedure approved by the Third Circuit in *Moonblatt* v. *Kosmin, supra,* which this Court overruled in the *Cline* v. *Kaplan* case. But if "consent"to summary jurisdiction can be given orally in open court, surely an oral challenge and objection in open court to the exercise of summary jurisdiction can be no less effective to negative consent and inform the referee that his power was challenged, particularly when made in conjunction with a written challenge by the attorney for the bankrupt, and followed by petitioner's written formal protest filed prior to entry of the referee's order. It was so held in the Ninth Circuit in *Hall* v. *Goggin* (C. C. A. 9th), 148 F. (2d) 774, 775, where the court said, "But we are satisfied that the oral protest was sufficient to negative consent".

However, the Delaware District Court, in addition to omitting the referee's non-jurisdiction rulings as nonexistent, also wholly omits the said protests, oral and written, and by so doing found that Rule 12(h)(2) was "not important here." It is on this foundation that the Second Circuit rests its decision affirming the Connecticut District Court judgment.

Retrospectively this matter may appear to this Court to be of relatively slight importance. Lawyers are expendable. Prospectively, however, it would appear to be of transcending importance that the judiciary at all levels be required to turn square corners when dealing with matters of jurisdiction.

CONCLUSION

For the reasons stated herein it is respectfully submitted that this petition for a writ of certiorari should be granted.

JAMES A. VAUGHAN, *pro se,*
165 Broadway,
New York 6, New York.

Dated: New York, New York, September 14, 1954.

Proof of Service

I, JAMES A. VAUGHAN, a member of the Bar of the Supreme Court of the United States hereby certify that on the 14th day of September 1954, I served copies of the foregoing Petition for Writ of Certiorari on the trustee in bankruptcy of Petroleum Conversion Corporation, bankrupt of Petroleum Conversion Corporation, bankrupt, by depositing same post wrapped in the United States Post Office at 90 Church Street, New York, New York, with first class postage prepaid, addressed to his counsel, Morgan P. Ames, Esq., No. One Atlantic Street, Stamford, Connecticut.

/s/ JAMES A. VAUGHAN,
165 Broadway,
New York 6, New York.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 191—October Term, 1953.

(Argued March 10, 1954 Decided March 24, 1954.)

Docket No. 22963

JAMES A. VAUGHAN,

Plaintiff-Appellant,

— v. —

PETROLEUM CONVERSION CORPORATION, Bankrupt, and WILLIAM DUFFY, JR., Trustee in Bankruptcy,

Defendants-Appellees.

Before:

CLARK, MEDINA, and HARLAN, *Circuit Judges.*

Appeal from the United States District Court for the District of Connecticut, J. Joseph Smith, *Judge.*

Plaintiff appeals from the dismissal of his complaint seeking relief under F. R. 60(b)(4) and (6) against a judgment entered by a referee in bankruptcy in the United States District Court for the District of Delaware, and after affirmance, registered in the United States District Court for the District of Connecticut under the provisions of 28 U. S. C. §1963.

JAMES A. VAUGHAN, New York City, *pro se, plaintiff-appellant.*

MORGAN P. AMES, Stamford, Conn. (Howard S. Tuthill, Warren W. Eginton, and Cummings & Lockwood, Stamford, Conn., on the brief), *for defendants-appellees.*

PER CURIAM:

In his opinion, District Judge Smith has carefully considered the various procedural and substantive problems raised by the plaintiff's attempt to secure relief under F. R. 60(b) against an adverse judgment of a bankruptcy court in Delaware registered in the court below pursuant to 28 U. S. C. §1963; we see little to add. Without considering various difficulties of procedure which may stand in the way of the relief sought, it will suffice to say that no issue of jurisdiction, and hence as to the validity of the judgment, survives the careful findings of waiver and consent to the summary jurisdiction of the bankruptcy court made by the United States District Court for the District of Delaware, *In re Petroleum Conversion Corp.*, D. C. Del., 99 F. Supp. 899, and affirmed on appeal, 3 Cir., 196 F. 2d 728, certiorari denied *Vaughan* v. *Petroleum Conversion Corp.*, 344 U. S. 917. See *Cline* v. *Kaplan*, 323 U. S. 97, 100; Bankruptcy Act §2a(7), 11 U. S. C. §11(a)(7), as amended in 1952, and §23b, 11 U. S. C. §46(b); F. R. 12(h); 2 Collier on Bankruptcy ¶23.08 (14th Ed. 1940) and *id.* 49-51 (1953 Cum. Supp.).

Judgment affirmed.

APPENDIX

SENATE

82D CONGRESS—2D SESSION

Calendar No. 1299

Report No. 1395

AMENDING THE BANKRUPTCY ACT

* * * * *

Mr. McCarran, from the Committee on the Judiciary, submitted the following

REPORT

(To Accompany S. 2234)

* * * * *

Section 2(b) of the bill amends section 2a(7) of the act by adding a provision which corrects a defect that has arisen under section 23a of the act. Rather than amend section 23a, it is deemed more effective to expand section 2a(7) so that the change will then become applicable to the entire act, including the debtor-relief chapters.

Under section 23a, where a controversy involves property which is not in the actual or constructive possession of the bankruptcy court, but is held adversely, nevertheless, the court is vested with summary jurisdiction where the respondent consents thereto; and it has generally been held that a respondent consented when he did not object to such jurisdiction, either by preliminary motion or in his answer, and proceeded on the merits (*Moonblatt* v. *Kosmin*, 55 Am. B. R. (N. S.) 267, 139 F. 2d 412 (C. C. A. 3d 1943)). However, in *Cline* v. *Kaplan* (323 U. S. 97), the Supreme Court, in 1944, overruled this line of cases and held, in effect, that a respondent has not consented to the summary jurisdiction of the bankruptcy court if he

made formal objection at any time before the entry of the final order in the proceeding, even though the controversy had gone forward on its merits without his preliminary objection to jurisdiction. This decision has unsettled sound procedure and unnecessarily delays an expeditious administration in bankruptcy. A respondent may now proceed on the merits in the bankruptcy court and gamble on a favorable decision in the summary proceeding, and when he senses that the decision will be against him on the merits, he may interpose his formal objection to jurisdiction at any time before the entry of the order, and, should his objection be sustained, the summary proceeding must be dismissed. In such cases, the trustee is required to relitigate the issues by a plenary action.

The proposed amendment is intended to overcome this unsatisfactory situation and is keyed to Rule 12(h) of the Federal Rules of Civil Procedure, which requires the timely interposition of an objection to jurisdiction and, if not so made, the defense is deemed waived.

H. R. Report No. 2320 to accompany S. 2234 is substantially verbatim and for this reason is omitted.

Rule 12(h), Federal Rules of Civil Procedure

Waiver of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defenses of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, and the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received. As amended Dec. 27, 1946, effective March 19, 1948.

Rule 60(b), Federal Rules of Civil Procedure

[b] MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: [1] mistake, inadvertence, surprise, or excusable neglect; [2] newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59[b]; [3] fraud [whether heretofore denominated intrinsic or extrinsic], misrepresentation, or other misconduct of an adverse party; [4] the judgment is void; [5] the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or [6] any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons [1], [2], and [3] not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision [b] does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 344.

JAMES A. VAUGHAN,

Petitioner,

v.

PETROLEUM CONVERSION CORPORATION, BANKRUPT, AND WILLIAM DUFFY, JR., TRUSTEE IN BANKRUPTCY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

The petitioner here is the same as in No. 395, October Term, 1952, and the subject matter and the substantial questions involved here are the same as were involved in the former petition.

It is respondents' position that all of the reasons presented in opposition to the former petition are equally applicable here, and that the only difference between the

situation now and the situation in January 1953, when this Court denied the former petition, is that since that time the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit have also ruled against petitioner and have agreed with the Referee in Bankruptcy of the United States District Court for the District of Delaware, with Chief Judge Paul Leahy of that court on petition for review, and with the United States Court of Appeals for the Third Circuit. The latter two decisions are reported at 99 F. Supp. 899 and 196 F. 2d 728, respectively.

After this Court had denied the former petition for a writ of certiorari, respondents registered the judgment involved in the United States District Court for the District of Connecticut pursuant to Section 1963, Title 28, U. S. Code. Petitioner then brought an action in that court to remove the lien of the registered judgment from his property in Connecticut. That court dismissed the complaint and, on appeal, the United States Court of Appeals for the Second Circuit affirmed.

Thus, two courts of appeals and two district courts have determined the substantial questions involved adversely to petitioner, and the petition for certiorari should be denied because there is no conflict between circuits.

As pointed out in opposition in the former petition, not only is the decision below clearly correct, but, in any event, it does not involve any important question of Federal law. As appears from the appendix to the instant petition, and as set out more fully in opposition to the former petition, the Congress has enacted into positive statutory law the rule for which respondents have contended successfully in every court to which the question has been presented.

Thus, the only substantial question which the instant petition presents to this Court is whether, prior to the enactment of the statute, the rule was otherwise. This is a

question of very limited importance (probably *only* to petitioner) for which petitioner has had full opportunity in four courts to contend.

Respondents respectfully urge that this Court deny the instant petition.

THOMAS COOCH,
MORGAN P. AMES,
Counsel for Respondents.

October 15, 1954.

CONNOLLY, COOCH & BOVE,
Delaware Trust Building,
Wilmington 1, Delaware.

CUMMINGS AND LOCKWOOD,
One Atlantic Street,
Stamford, Connecticut.

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FILED
OCT 29 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1954
No. 344

JAMES A. VAUGHAN,

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PETROLEUM CONVERSION CORPORATION, Bankrupt, and WILLIAM DUFFY, JR., Trustee in Bankruptcy,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

JAMES A. VAUGHAN, *pro se,*
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APPELLATE PRESS CORP., 114 WORTH STREET, N. Y., COrtlandt 7-7627

IN THE

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v.

PETROLEUM CONVERSION CORPORATION, Bankrupt, and WILLIAM DUFFY, JR., Trustee in Bankruptcy,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

The statement on page 1 of respondents' brief that "* * * the subject matter and the substantial questions involved here are the same as were involved in the former petition", in No. 395 October Term 1952, is misleading.

The challenge of the Delaware referee's power to assume and exercise summary jurisdiction, after he undeniably determined and ruled at the beginning of proceedings before him that he lacked jurisdiction over the subject matter, is common to both the former and the present petitions. For the reason that the referee concealed his initial non-jurisdiction rulings of record, by omitting them from his findings, conclusions and opinion, the only way your petitioner had to bring them to the attention of the Delaware District Court on review and the Court of Appeals for the Third Circuit on appeal was by briefs and by argu-

ment. But to the Delaware District Court the mandate of Rule 12(h)(2) of the Rules of Civil Procedure was "not important here" and the Third Circuit ignored the mandate.

However, in his independent action in the Connecticut District Court pursuant to the provisions of Rule 60(b)-(4)(6) asking relief from the Delaware referee's judgment, by injunction, your petitioner pleaded, (1) the Delaware referee's non-jurisdiction determination and rulings—the facts of record, and (2) the facts of record with respect to the stale issue raised in the trustee's counterclaim, and as defined by the referee, viz., that your petitioner served interests adverse to the bankrupt in the protracted *Dickinson* v. *Rinke* litigation.

By virtue of the jurisdiction duplicity exercised by the Delaware referee, first disclosed when he handed down his findings, conclusions and opinion, there was no prior opportunity to bring such facts before the Court. They were accordingly first presented in your petitioner's verified complaint in his action in the Connecticut District Court.

Your petitioner's complaint in the Connecticut District Court raises questions of both fact and law. For purposes of respondents' motion to dismiss, the allegations of the complaint are, by the accepted and usual course of judicial proceedings, treated as true. Both the Connecticut District Court and the Court of Appeals for the Second Circuit, however, wholly ignored the Delaware referee's non-jurisdiction rulings of record and the facts of record pertaining to the stale issue raised in the trustee's counterclaim, as set forth in your petitioner's complaint.

The fundamental principle here involved is not that two District Courts and two Courts of Appeals have "agreed" with the Delaware referee, but it is that two District Courts and two Courts of Appeals should stamp with approval the

undenied jurisdiction duplicity assumed and exercised by the Delaware referee contrary to the clear mandate of Rule 12(h)(2); that they should disregard the rule of this Court in *Cline* v. *Kaplan*, generally followed except in the Third Circuit, and in full force throughout the litigation in this case.

Your petitioner believes he is entitled, on the facts in this case, to the benefit and protection of the applicable Rules and decisions usually employed in the ordinary course of judicial proceedings and therefore respectfully prays that his petition herein be granted.

JAMES A. VAUGHAN, *pro se*,
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New York 6, New York.

Dated: New York, New York, October 28, 1954.

Proof of Service

I, JAMES A. VAUGHAN, a member of the Bar of the Supreme Court of the United States hereby certify that on the 28th day of October 1954, I served copies of the foregoing Reply Brief on the trustee in bankruptcy of Petroleum Conversion Corporation, bankrupt, by depositing same post wrapped in the United States Post Office at 90 Church Street, New York, New York, with first class postage prepaid, addressed to his counsel, Morgan P. Ames, Esq., No. One Atlantic Street, Stamford, Connecticut.

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